



there, so I had to dig them back out, and throwing them up over -- the dumpster is probably 7-foot deep, and throwing them out of the dumpster, to get them out of the dumpster, I strained my back.<sup>1</sup>

Claimant testified that Jim Frye directed him to remove the limbs from the dumpster and Mr. Frye agreed that he had told claimant to perform that job. Claimant further testified that he told Neil Knight, plant manager, that he had hurt his back performing that activity within the first week after his accident and he completed an accident report.

Mr. Frye, quality control manager, testified that it was a week after claimant's accident that he became aware that claimant alleged an injury from removing the limbs from the dumpster. But he then qualified his response and noted he was just aware claimant was complaining his back was stiff after the incident in July. And Mr. Frye then testified that he could not recall when he became aware claimant was alleging an injury from removing the limbs from the dumpster. On cross-examination, Mr. Frye testified he could not recall a conversation with claimant within the first week after the alleged accidental injury. But Mr. Frye agreed that at some point claimant did tell him he hurt his back taking limbs from the dumpster and he could not recall whether that conversation occurred within ten days after July 17, 2008.

Neil Knight, manufacturing manager, testified he was not aware of claimant's injury before September 12, 2008. Mr. Knight further testified that he could not recall claimant coming to him and reporting that he injured his back removing the limbs from the dumpster. And he further noted that if claimant had reported the injury Mr. Knight would have sent him to Mr. Frye. Finally, Mr. Knight testified that he could not recall if he had a conversation with claimant within a week or ten days after July 17, 2008.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>2</sup> A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."<sup>3</sup> The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>4</sup>

The claimant was directed by his employer to remove limbs from a dumpster. He then injured his back performing that activity. This Board Member finds claimant has met

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<sup>1</sup> P.H. Trans. at 5.

<sup>2</sup> K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>3</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>4</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment.

The Workers Compensation Act requires workers to give notice of their accidental injury within 10 days of when it occurs. But that 10-day period may be extended to 75 days if the worker has just cause for failing to notify the employer within the initial 10-day period following the accident.<sup>5</sup>

The claimant testified that he immediately provided notice to Mr. Knight regarding the accident and filled out an accident report. Mr. Knight could not recall such conversation with claimant but indicated that if it had occurred he would have sent claimant to Mr. Frye. And Mr. Frye initially testified that he was aware of the accident within a week but later equivocated and ultimately could not recall when claimant told him he had hurt his back removing the limbs from the dumpster. Claimant testified that he provided notice and neither Mr. Frye nor Mr. Knight disputed that testimony as they simply could not recall when such conversations occurred. This Board Member finds claimant has met his burden of proof that he provided timely notice to respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>7</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated March 22, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this 28th day of May 2010.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Matthew R. Bergmann, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge

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<sup>5</sup> See K.S.A. 44-520.

<sup>6</sup> K.S.A. 44-534a.

<sup>7</sup> K.S.A. 2009 Supp. 44-555c(k).